Supreme Court, U.S.
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No. 92-249

In The

Supreme Court of the United States

October Term, 1992

AMERICAN AIRLINES, INC.,

Petitioner,

v.

MYRON WOLENS, ALBERT J. GALE, R. CRAIG ZAFIS
BRET MAXWELL, ROBERT NELSON and P.S. TUCKER,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Illinois

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Illinois Supreme Court correctly conclude that federal law does not preempt state law damage claims based on an airline's unilateral and retroactive alteration of the terms of its contract with members of its frequent flyer program?

2. Did the Illinois Supreme Court correctly conclude that the Commerce Clause does not bar plaintiffs' state law damage claims based on an airline's unilateral and retroactive alteration of the terms of its contract with members of its frequent flyer program?

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OPINIONS BELOW

The opinions and judgments delivered in this case are as follows: (1) *Wolens v. American Airlines, Inc.*, 589 N.E.2d 533 (Ill. 1992);[1] (2) *Wolens v. American Airlines, Inc.*, 565 N.E.2d 258 (Ill. App. Ct. 1990);[2] *Wolens v. American Airlines, Inc.*, No. 88 CH 7554, slip op. (Ill. Cir. Ct. Mar. 20, 1989;[3] and (4) *Wolens v. American Airlines, Inc.*, No. 88 C

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[1] Appendix to Petition for Writ of Certiorari ("App.") at 1a-11a.

[2] App. at 12a-21a.

[3] App. at 22a-28a.

8158, 1988 U.S. Dist. LEXIS 12,026 (N.D. Ill. Oct. 25, 1988) (decision to remand state court action).[4]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional provisions and statutes cited in the Petition for Writ of Certiorari (the "Petition") of American Airlines, Inc. ("American"), the following statute is relevant here:

> Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

49 U.S.C. § 1506.

STATEMENT OF THE CASE

A. The AAdvantage Program.

Plaintiffs-respondents ("plaintiffs") are members of American's "frequent flyer" club, known as the "AAdvantage Program." American and the other AAdvantage Program participants – including hotels, bank credit cards, a long distance telephone network, car rental agencies, and other airlines – offer members of the club credits which they can use to secure various benefits offered by the participants. Anyone who becomes a member of the

[4] Appendix to Brief in Opposition to Petition for Writ of Certiorari ("Opposition App.") at 1a-8a.

AAdvantage Program can earn awards without ever flying, and can use those awards to obtain significant non-airline travel benefits offered by participants.[5]

American induced plaintiffs to apply for membership in the AAdvantage Program by representing to them that the greater the AAdvantage awards earned, the greater the benefits they would be entitled to receive. (*See Wolens* Complaint ¶ 2; *Tucker* Complaint ¶ 2 (App. at 30a, 43a)). Plaintiffs accepted American's offer to become members of the Program, and proceeded to accumulate substantial credits by using the facilities and benefits of other participants in the AAdvantage Program, even if doing so was more costly and less convenient than using non-participants' facilities and benefits. (*See Wolens* Complaint ¶¶ 3, 4; *Tucker* Complaint ¶ 5 (App. at 30a-31a, 43a-44a)).

In the late spring of 1988, American unilaterally and *retroactively* altered the terms of its contract with the AAdvantage Program members by instituting various restrictions on members' use of their previously earned AAdvantage credits. (*See Wolens* Complaint ¶ 14; *Tucker* Complaint ¶ 14 (App. at 33a, 46a)). These restrictions substantially reduced the value of the AAdvantage credits previously earned by Program members. (*See Wolens* Complaint ¶ 4; *Tucker* Complaint ¶ 6 (App. at 31a,

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[5] While American concedes that non-airline services are involved in the AAdvantage Program, it argues that non-flight services are not at issue. (Petition at 3 n.2). This is factually inaccurate. The Program itself is the contract at issue. The value of the AAdvantage credits earned by members from both airline and non-airline participants prior to the retroactive changes to the Program has diminished as a result of American's breach of this contract.

44a)). Although American had reserved the right to restrict, suspend, or otherwise alter aspects of the Program, it never reserved the right to do so *retroactively* so as to diminish the value of the AAdvantage credits previously earned and accumulated by Program members.[6]

B. The Proceedings Below.

Plaintiffs, who are residents of Illinois, Texas, California, and Connecticut, filed these now-consolidated class action Complaints in the Circuit Court of Cook County to remedy Petitioner's wholesale disregard of its common law and statutory obligations to AAdvantage Program members. Plaintiffs asserted claims against American for breach of contract and for violations of the Illinois Consumer Fraud and Deceptive Business Practices Act (the "Consumer Fraud Act"), Ill. Rev. Stat. ch. 121 ½, § 261 *et seq.* *See* App. at 29a-54a.[7]

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[6] While American insists that its modifications to the AAdvantage Program have been beneficial on the whole (*see* Petition at 3-4 & 4 n.4), that assertion is not supported by any facts in the Record. More fundamentally, American does not have the right to breach its agreement with Program members in ways which decrease the value of the AAdvantage awards even if other modifications to the Program increase the value of those awards. Contract law does not provide an "offset" mechanism.

[7] American incorrectly states that plaintiffs brought their common law contract claims under Illinois law. (Petition at 5 n.5). The Complaints contain no such assertion. The Illinois courts, using standard choice of law principles, can determine which state's law governs the contract claims. In any event,

American removed *Wolens* to the United States District Court for the Northern District of Illinois. The District Court remanded, holding that American's preemption defense did not transform plaintiffs' state claims into federal claims. Opposition App. at 1a-8a. The District Court further questioned the viability of American's preemption argument, indicating that it would "face an uphill struggle" in the Illinois courts. Opposition App. at 6a n.2. This statement proved prescient.

After the remand, American filed a motion to dismiss the *Wolens* and *Tucker* Complaints in the Circuit Court of Cook County, asserting that plaintiffs' state law claims were expressly or impliedly preempted by federal aviation law, and that they were precluded by the Commerce Clause of the United States Constitution. The Circuit Court rejected American's arguments, and denied its motion to dismiss the Complaints. App. at 22a-28a. On interlocutory appeal, App. at 22a, the Illinois Appellate Court affirmed the Circuit Court's ruling in part. App. at 12a-21a.

The Illinois Supreme Court unanimously affirmed the ruling of the Illinois Appellate Court. App. at 1a-11a. Like the Illinois Appellate Court, the Illinois Supreme Court ruled that Section 1305 of the Airline Deregulation Act

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Illinois' common law contract principles do not vary significantly from those of other states.

Further, American's concern about the application of the Illinois Consumer Fraud Act to all class members' claims is premature since a class has not yet been certified. Its concern is also unjustified. This Court has determined that a state court, in adjudicating a nationwide class action based upon violations of state law, may apply its own law if it would not be arbitrary or fundamentally unfair to do so. *See Phillips Petroleum Co. v. Shutts.* 472 U.S. 797, 818 (1985).

("Section 1305"), 49 U.S.C. § 1305, did not preempt plaintiffs' breach of contract and consumer fraud claims for money damages because those claims had only a "tangential relationship to [American's] rates and services . . . ," but that Section 1305 did preempt plaintiffs' claims for injunctive relief since such relief would effectively result in the regulation of American's services by a state court. *Id.* The court further concluded that the Commerce Clause did not bar plaintiffs' claims. Thus, the judgment presented to this Court for review simply holds that plaintiffs' garden-variety breach of contract and consumer fraud claims for damages are neither preempted by federal law nor barred by the Commerce Clause.[8]

REASONS FOR DENYING THE PETITION FOR CERTIORARI

American's Petition for a Writ of Certiorari is premised primarily upon purported conflicts between the decision of the Illinois Supreme Court and decisions of this Court in *Morales v. Trans World Airlines, Inc.*, ___ U.S. ___, 112 S. Ct. 2031 (1992), and the Seventh Circuit in *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751 (7th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990). These conflicts are illusory. Moreover, the decision below does not raise any important federal question which requires review and resolution by this Court.

[8] Plaintiffs have not filed a cross-petition challenging the Illinois Supreme Court's ruling that federal law preempts their claims for injunctive relief.

I. THE DECISION OF THE ILLINOIS SUPREME COURT IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN *MORALES V. TRANS WORLD AIRLINES, INC.*

A. The Illinois Supreme Court's Reasoning Is Fully Consistent With The Analysis Subsequently Adopted By This Court In *Morales*.

1. *Morales* Recognizes Limits To The Scope Of Preemption Under Section 1305.

In *Morales v. Trans World Airlines, Inc.*, ___ U.S. ___, 112 S. Ct. 2031 (1992), this Court analyzed preemption under Section 1305 with respect to the narrow issue of potential enforcement of specific prosecutorial guidelines adopted by the National Association of Attorneys General ("NAAG") regulating the advertising of airline rates. The Court interpreted Section 1305 to preempt "[s]tate enforcement actions having a connection with or reference to airline 'rates, routes, or services'. . . . " *Id.* at 2037. The Court found that the NAAG guidelines "obviously" relate to rates since they "establish binding requirements as to how tickets may be marketed if they are to be sold at a given price." *Id.* at 2039. The *Morales* Court stressed that the guidelines would not simply prevent "market distortion caused by 'false' advertising," but would actually limit air carriers' "ability to communicate fares to their customers." *Id.* at 2040.

Significantly, *Morales* acknowledges limits to preemption under Section 1305, observing that " 'some state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner' to have pre-emptive effect." *Id.* (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21

(1983)). As an example, the *Morales* Court noted that its decision would not lead inevitably to the preemption of state laws regarding gambling and prostitution. *Id.* It also noted that regulation of non-price aspects of fare advertising may not relate to rates so as to result in preemption. *Id.* The Court, though, declined to establish any guidelines for distinguishing between claims which are preempted and those which are not preempted, writing: " 'The present litigation plainly does not present a borderline question, and we express no views about where it would be appropriate to draw the line.' " *Id.* (quoting *Shaw v. Delta Airlines, Inc.*, 463 U.S. at 100 n.21).

Morales also recognized the continuing vitality of the savings clause contained in Section 1506 of the Federal Aviation Act of 1958 which provides: "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 49 U.S.C. § 1506. The Court indicated that if the state claim or regulation did not have a sufficient relationship to an airline's rates, routes, or services, it would be saved by Section 1506. *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. at 2037.

Thus, contrary to American's implication, the *Morales* Court did *not* hold that all state law claims against air carriers are preempted by Section 1305. Under the analysis adopted in *Morales*, the question of whether a state claim sufficiently "relates to rates, routes, or services" so as to be preempted by Section 1305 requires a fact-specific inquiry.

2. The Analysis Used By The Illinois Supreme Court Parallels The Analysis Approved In *Morales*.

Despite the "spin" which American places on the decision of the Illinois Supreme Court, the preemption analysis used by the court below is fully consistent with *Morales*. The Illinois Supreme Court, after examining plaintiffs' breach of contract and consumer fraud claims for injunctive and monetary relief, issued a carefully reasoned decision. The court held that plaintiffs' ordinary state claims for money damages have only a "tangential" connection with American's rates and services, but that their claims for injunctive relief would require the court to regulate the manner in which American provided its passenger transportation services. App. at 4a, 5a. Thus, the court concluded that Section 1305 preempted plaintiffs' claims for injunctive relief, but not their claims for money damages. *Id.*

In reaching these conclusions, the Illinois Supreme Court used an analysis which parallels the analysis approved by this Court in *Morales*. *Morales* determined that Section 1305 preempts state claims which have a "connection with or reference to" an airline's rates, routes, or services, unless that connection is "too tenuous, remote, or peripheral." *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. at 2040. The Illinois Supreme Court's determination that plaintiffs' damage claims were only "tangentially connected" with American's services is a finding that the connection was "too tenuous, remote, or peripheral" to warrant preemption.

The Illinois Supreme Court did not exclude from Section 1305's preemptive scope state law claims based

on laws of general applicability when such claims have more than a "tangential" relationship to the rates, routes, or services of air carriers. If, as American insists, the court simply concluded that Section 1305 could never preempt laws of general application, it would not have assessed the connections between plaintiffs' claims and American's services to determine whether they were "tangential," nor would it have held that Section 1305 preempts plaintiffs' claims for injunctive relief, which are based on laws of general applicability. American's strained interpretation of the language in the opinion of the Illinois Supreme Court widely misses the mark.

B. Unlike The Regulations Involved In *Morales* And The Claim Involved In *West*, The Garden-Variety Contract And Consumer Fraud Claims At Issue Here Do Not Have Even A Tenuous, Remote, Or Peripheral Connection To American's Rates, Routes, Or Services.

In *Morales*, the Court was presented with the question of whether Section 1305 preempted specific prosecutorial guidelines which directly regulate the manner in which airlines advertise rates. The Court noted that Section 1305 was designed "[t]o ensure that the States would not undo federal deregulation with regulation of their own. . . . " *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. at 2034. Examining the NAAG fare advertising regulations in light of this purpose, the Court determined that prosecutorial enforcement of those guidelines would have a sufficiently close connection to airline "rates" to be preempted by Section 1305. *Id.* at 2039-40.

Plaintiffs' damage claims are factually distinct from the claim presented in *Morales.*[9] *In Morales,* state attorneys general sought to impose upon airlines stringent rules governing their fare advertisements. In stark contrast with the proposed state regulations at issue in *Morales,* there is no danger that plaintiffs' garden-variety damage claims, if permitted to proceed, will "undo federal deregulation."

While explicit fare advertising regulations certainly affect air carriers' rates, the monetary relief sought here has no intrusive effect on American's services. An award of money damages will simply provide compensation to AAdvantage Program members injured by American's breach of the contractual obligations it voluntarily assumed and by its fraudulent conduct. Monetary relief will in no way alter, affect, or amend American's "services," which are generally defined as including "ticketing, boarding, in-flight service, and the like." *Stewart v. American Airlines, Inc.,* 776 F. Supp. 1194, 1197 (S.D. Tex. 1991). A damage award will not affect who is transported on American, when they are transported, where they are transported, or the circumstances under which they are transported.[10]

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[9] In its Petition, American does not explicitly assert that plaintiffs' damage claims relate in any way to its rates or routes. Presumably then, American concedes that those claims do not relate to its rates or routes, and contends only that they relate to its services.

[10] The lack of a direct relationship between plaintiffs' damage claims and American's services is highlighted by the fact that a Program member need never fly to accumulate credits, and can use those credits to obtain significant benefits from non-airline participants.

Further, monetary relief will not require American to follow any particular rules or regulations, such as the NAAG frequent flyer or fare advertising guidelines.[11] Since American reserved the right to make prospective changes to the contract with AAdvantage Program members, damages will have no effect whatsoever on its future use of capacity control restrictions and blackout dates. It is only American's *retroactive* amendments to its contractual agreement with Program members that have exposed it to liability under state law.

American attempts to draw this case within the framework of *Morales* by inaccurately asserting that plaintiffs "seek to create 'binding requirements' and 'enforceable rights' between American and millions of AAdvantage members." (Petition at 12). In fact, plaintiffs seek only to enforce their existing rights under their contracts with American and under the Consumer Fraud Act. American also inaccurately contends that plaintiffs seek to force it to accept certain credits as payment for any seat, and to limit American's ability to impose capacity controls and blackout dates. (Petition at 12-13). This

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[11] American's assertion that, if successful, plaintiffs' claims will require it to follow the NAAG frequent flyer guidelines is a transparent attempt to create a factual similarity between this case and *Morales*. Although Section 3 of the NAAG guidelines sets forth rules governing frequent flyer programs, *see* Appendix to *Morales*, 112 S. Ct. at 2049-2054, *Morales* addressed only the NAAG fare advertising guidelines – not the frequent flyer guidelines. Further, the state attorneys general in *Morales* brought suit specifically to enforce the NAAG fare advertising guidelines. Plaintiffs here do not seek enforcement of the NAAG frequent flyer guidelines; they seek only to obtain monetary relief for American's breach of contract and consumer fraud.

argument is premised on plaintiffs' claims for *injunctive* relief – not their claims for damages. In holding that Section 1305 preempts plaintiffs' claims for injunctive relief, the Illinois Supreme Court effectively mooted American's argument. Accordingly, the question before this Court involves *only* plaintiffs' money damage claims, and an award of monetary relief will not restrict American's ability to impose capacity controls and blackout dates.[12]

This Court's decision to vacate and remand *West v. Northwest Airlines, Inc.*, 923 F.2d 657 (9th Cir. 1990), *vacated*, ___ U.S. ___, 112 S. Ct. 2932 (1992), is not dispositive of this case, either. In that case, plaintiff sought damages against an air carrier for breach of its duty of

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[12] In other preemption contexts, the Court has recognized that a claim for monetary relief has a more remote impact on industry than direct regulation. *See English v. General Electric Co.*, 496 U.S. 72, 85 (1990) ("[F]or a state law to fall within the preempted zone, it must have some direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels. We recognize that the claim for intentional infliction of emotional distress at issue here may have some effect on these decisions, because liability for these claims will attach additional consequences to retaliatory conduct by employers. As employers find retaliation more costly, they will be forced to deal with complaints by whistleblowers by other means, including altering radiological safety policies. Nevertheless, we believe that this effect is neither direct nor substantial enough to place petitioner's claim in the preempted field."); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-86 (1988) ("The effects of direct regulation on the operation of federal projects are significantly more intrusive than the incidental regulatory effects of such an additional [state workers' compensation] award provision.") (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984)).

good faith and fair dealing arising out of its bumping him from one of its overbooked flights. This case, in contrast, does not implicate American's boarding policies or any other "services" provided by American. Moreover, as previously noted, the AAdvantage Program involves benefits which have nothing to do with either air carriers or their services.[13]

C. Decisions Before And After *Morales* Indicate That State Law Damage Claims Against Air Carriers, Such As Those Asserted By Plaintiffs, Are Not Preempted By Section 1305.

In *Cipollone v. Liggett Group, Inc.*, ___ U.S. ___, 112 S. Ct. 2608 (1992), decided after *Morales*, this Court reaffirmed the basic principle that there is a "presumption against the preemption of state police power regulations." *Id.* at 2618. *Accord Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 741 (1985); *Federal Express Corp. v. California Public Utilities Commission*, 936 F.2d 1075, 1078 (9th Cir. 1991) (construing Section 1305), *cert. denied*, ___ U.S. ___, 112 S. Ct. 2956 (1992). The *Cipollone* Court implicitly rejected the view of the dissent that a presumption against preemption was inconsistent with the Court's prior ruling in *Morales*. *See Cipollone v. Liggett*

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[13] Contrary to American's implication, the Illinois Supreme Court did not rely solely on *West*. The court also cited *Bieneman v. City of Chicago*, 864 F.2d 463 (7th Cir. 1988), *cert. denied*, 490 U.S. 1080 (1989), and engaged in a fact-specific analysis of plaintiffs' claims. *See* App. at 4a. Thus, this Court's decision to vacate and remand *West* does not mandate the same disposition of American's Petition.

Group, Inc., 112 S. Ct. at 2632-33 (Scalia, J., dissenting). This presumption against preemption is applicable to traditional state claims, such as the garden-variety breach of contract and consumer fraud claims asserted by plaintiffs. *See, e.g., California v. ARC America Corp.*, 490 U.S. 93, 101 (1989); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146 (1963).[14]

Federal courts interpreting Section 1305 have recognized that it does not preempt all state claims. *See Federal Express Corp.*, 936 F.2d at 1078; *Stewart v. American Airlines, Inc.*, 776 F. Supp. at 1197, 1198. For example, in *Bieneman v. City of Chicago*, 864 F.2d 463 (7th Cir. 1988), *cert. denied*, 490 U.S. 1080 (1989), a case relied upon by the court below, the Court of Appeals for the Seventh Circuit rejected a preemption challenge to the viability of a state tort claim against air carriers for intentional reduction in the value of property near an airport. Judge Easterbrook, writing for the court, stressed that the "[t]he Federal Aviation Act does not expressly preempt state damages remedies. . . . " *Id.* at 471.[15]

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[14] While the *Cipollone* Court held that federal law preempted some state law tort claims, it determined that plaintiff's claim for breach of express warranty was not so preempted. *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. at 2622-23. Notably, the Court determined that "a common law remedy for a contractual commitment voluntarily undertaken" did not constitute a "requirement imposed under State law" for purposes of the express preemption provision at issue. *Id.* at 2622.

[15] *Bieneman* is neither isolated nor unique. Prior to *Morales*, courts almost uniformly concluded that state claims for damages which do not regulate the rates, routes or services provided by air carriers are not preempted. *See G.S. Rasmussen & Associates, Inc. v. Kalitta Flying Service, Inc.*, 958 F.2d 896 (9th Cir. 1992)

American's reliance on *Complaint and Rulemaking Petition of Association of Discount Travel Brokers*, Docket Nos. 46280, 47539 (DOT Order May 29, 1992), is completely misplaced. In fact, American's arguments in that matter support plaintiffs' position. The Association of Discount Travel Brokers, whose members purchase and sell frequent flyer awards, sought to require the Department of Transportation ("DOT") to establish nationwide

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(holding state law claim for unjust enrichment and conversion of a certificate issued by the Federal Aviation Administration not preempted), *petition for cert. filed*, 60 U.S.L.W. 3860 (June 5, 1992); *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408, 1415-16 (9th Cir. 1984) (while holding that some state claims were preempted, court determined that state law claim for intentional infliction of emotional distress was not preempted); *Stewart v. American Airlines, Inc.*, 776 F. Supp. at 1197-1200 (distinguishing *Mattox v. Trans World Airlines, Inc.*, 897 F.2d 773 (5th Cir. 1990), *aff'd sub nom., Morales v. Trans World Airlines, Inc.*, ___ U.S. ___, 112 S. Ct. 2031 (1992), court held that state law tort claims for injuries suffered during an in-flight malfunction not preempted); *In re Air Crash Disaster at Sioux City*, 734 F. Supp. 1425, 1428 (N.D. Ill. 1990) (holding punitive damage claims not preempted); *In re Air Crash Disaster at Stapleton International Airport, Denver*, 721 F. Supp. 1185, 1187 (D. Colo. 1988) (holding state law tort claims for damages not preempted); *Brunwasser v. Trans World Airlines, Inc.*, 541 F. Supp. 1338, 1345-46 (W.D. Pa. 1982) (holding that federal law does not preempt claim for damages under the Pennsylvania Unfair Trade Practices and Consumer Protection Act); *Stream Aviation, Inc. v. Anders Production, Inc.*, 517 So. 2d 1157, 1159-61 (La. Ct. App. 1987) (holding that breach of contract claim against air carrier was not preempted), *cert. denied*, 521 So. 2d 1171 (La. 1988). *Cf. Air Transport Ass'n. of America v. Public Utilities Commission*, 833 F.2d 200 (9th Cir. 1987) (holding that regulation of air carriers' telephone reservation services not preempted), *cert. denied*, 487 U.S. 1236 (1988).

standards for frequent flyer programs (including the elimination of capacity controls and unreasonable black-out dates). App. at 71a-72a. In opposing the proposed rulemaking, the airlines argued, *inter alia*, that the DOT lacked jurisdiction to regulate frequent flyer programs since those programs extend beyond airlines (*e.g.*, hotels, rental companies). App. at 73a-74a.

Further, American stressed that the airlines' agreements with members of their frequent flyer programs, which prohibit the purchase and sale of frequent flyer awards, were "valid and enforceable *contractual* restrictions on assignment. . . . " App. at 72a (emphasis added). In rejecting the Association's Complaint and Rulemaking Petition, the DOT accepted this argument:

> Continental correctly describes the relationship between frequent flyer programs and their members as a *contract* in which the carrier offers to provide benefits subject to the program's terms and conditions and the participant accepts the offer by joining the program and flying on the carrier.

App. at 77a (emphasis added).[16]

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[16] Airlines, including American, have often brought state law claims against coupon brokers for breach of contract based upon their purchase and resale of frequent flyer program credits, and courts have recognized the contractual nature of the relationship between air carriers and frequent flyers. *See American Airlines v. Christensen*, 967 F.2d 410, 412 (10th Cir. 1992); *TransWorld Airlines, Inc. v. American Coupon Exchange, Inc.*, 913 F.2d 676, 685-88 (9th Cir. 1990); *American Airlines, Inc. v. American Coupon Exchange, Inc.*, 721 F. Supp. 61, 63 (S.D.N.Y. 1989). *Cf. Alaska Airlines, Inc. v. United Airlines, Inc.*, 902 F.2d 1400 (9th Cir.

Contrary to American's argument, the DOT certainly did not conclude that an air carrier can breach its contractual obligations without being held liable for money damages under state law. Plaintiffs do not seek to dictate American's contract terms, but to recover for the damages caused by American's breach of a contract, the terms of which it drafted and voluntarily accepted. The DOT did not determine that a state law damage claim for breach of contract – which relates, if at all, only tangentially to an airline's services – is preempted.

A finding of preemption would leave members of the AAdvantage Program with no remedy whatsoever, state or federal, for American's breach of contract.[17] It is difficult to comprehend how such a result could be compelled by anything in the text or history of the Airline Deregulation Act, which was certainly not intended to immunize airlines from liability for ordinary breach of contract claims. Accepting American's argument that plaintiffs' damage claims are preempted would give air carriers *carte blanche* to breach any contract to which they are parties – whether it is a contract with a supplier of aircraft parts or a contract with frequent flyer program

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1990) (allowing breach of contract suit by one airline against another regarding computer reservation system contracts), *app. dismissed*, 932 F.2d 1571 (9th Cir. 1991). Evidently, American is willing to invoke state law breach of contract remedies when it suits its purposes, but does not want to be held accountable for its own breaches of contract.

[17] Federal common law is an unlikely source of recovery. *See Miree v. DeKalb County, Ga.*, 433 U.S. 25, 28-33 (1977) (holding that federal common law did not apply to contract dispute between county and Federal Aviation Administration).

members. Such an absurd result is not mandated by Section 1305.

Since plaintiffs' simple damage claims for breach of contract and consumer fraud are no more than tenuously related to American's services – if indeed they are related at all – the decision of the Illinois Supreme Court is in complete harmony with *Morales*. It is thus unnecessary for this Court to vacate that decision and remand for further consideration.

II. THE DECISION OF THE ILLINOIS SUPREME COURT DOES NOT CONFLICT WITH THE SEVENTH CIRCUIT'S DECISION IN *ILLINOIS CORPORATE TRAVEL, INC.*

American's effort to create a conflict between the decision below and the Seventh Circuit's decision in *Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 889 F.2d 751 (7th Cir. 1989), *cert. denied*, 495 U.S. 919 (1990), is as strained as its assertion that the decision below conflicts with *Morales*.[18] In *Illinois Corporate Travel*, a travel agency alleged that American wrongfully refused to permit it to advertise the discounted rates at which it sold American's tickets, and asserted claims against American for violation of the Illinois Consumer Fraud Act and for tortious interference with contractual relations. The Court of Appeals, in affirming the district court's decision, held

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[18] American cited *Illinois Corporate Travel* to the appellate courts in Illinois. Yet, neither the Illinois Appellate Court nor the Illinois Supreme Court ever indicated that the Seventh Circuit's opinion presents any obstacle, much less an insurmountable one, to plaintiffs' state claims.

that federal law preempted the travel agency's state law claims since price advertising related to American's rates. *Id.* at 754.

Contrary to American's implication, *Illinois Corporate Travel* does *not* hold that all state law claims which involve contractual rights or which are asserted under the Consumer Fraud Act are preempted by Section 1305. Indeed, the court expressly rejected a "black and white" approach to preemption analysis under Section 1305, and declined to express an opinion on whether Section 1305 would preempt state law claims to enforce contractual rights and to control deceptive advertising. *Id.* at 754-55. The *Illinois Corporate Travel* court thus acknowledged the fact-specific nature of the preemption analysis mandated by Section 1305. Since the Illinois Supreme Court simply held that Section 1305 does not preempt the *particular* contract and consumer fraud money damage claims brought by plaintiffs, which are factually distinct from those at issue in *Illinois Corporate Travel,* the "unseemly conflict" between the decision of the court below and the ruling in *Illinois Corporate Travel* is imaginary.

III. THE DECISION OF THE ILLINOIS SUPREME COURT DOES NOT RAISE ANY IMPORTANT FEDERAL QUESTION WHICH WARRANTS REVIEW BY THIS COURT.

The conclusion by the court below that Section 1305 does not preempt plaintiff's state law breach of contract and consumer fraud damage claims was the result of a fact-sensitive analysis (as required by both *Morales* and *Illinois Corporate Travel*). The individualized nature of the

inquiry indicates that it will not have far-reaching ramifications for other cases so as to require plenary review by this Court.

The Illinois Supreme Court's conclusion that plaintiffs' claims are not impliedly preempted by the federal government's regulation of air travel is as unlikely a candidate for review as its express preemption ruling. Besides the wealth of earlier authority on implied preemption which supports the Illinois Supreme Court's ruling, *see Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1, 5-7 (1986), the recent decision in *Cipollone* obliterates American's implied preemption argument. In *Cipollone*, the Court concluded: "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. at 2618. Thus, a court should "resort to principles of implied preemption . . . only when Congress has been silent with respect to pre-emption." *Id.* at 2625 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). Since Congress has adopted an express preemption provision (*i.e.*, Section 1305), implied preemption is a non-issue.

Finally, the Illinois Supreme Court's rejection of American's Commerce Clause argument does not raise any "important" question necessitating review by this Court. First, while American raises the specter that Illinois will create a *de facto* national standard for frequent flyer programs, its argument ignores the fact that it is plaintiffs' *damage* claims for past misconduct which are at issue. Since no injunctive relief will be afforded, there can be no fear that Illinois will impose *any* standards, much

less nationwide standards.[19] Second, American's argument that uniform regulation is necessary is fatally undermined by the DOT's decision in *Complaint and Rulemaking Petition of Association of Discount Travel Brokers* which expressly rejected a proposed rulemaking to establish national standards for frequent flyer programs. *See also Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. at 7-13 (rejecting Commerce Clause claim asserted by international air carrier based on the supposed need for national uniformity in regulation). Finally, there is no evidence in the record to establish that an award of money damages against an air carrier will result in an excessive burden on interstate commerce in relation to

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[19] American's reliance on *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989), is misplaced. There, the Court held unconstitutional a Connecticut statute which required out-of-state shippers to affirm that their posted prices for products sold in Connecticut were no higher than those in the bordering states. The Court determined that the statute actually discriminated against interstate commerce by applying only to those engaged in interstate commerce (not those engaged only in Connecticut sales), and that it was not justified by any purpose other than economic protectionism. *Id.* at 340-41. The Court also concluded that the statute had the practical effect of controlling commerce outside of the state by requiring out-of-state shippers to base their prices in other states on what they charged in Connecticut. *Id.* at 337-40. This case presents no similar interstate commerce concerns. The common law of contracts and the Consumer Fraud Act apply equally to intrastate and interstate air carriers, and do not discriminate against interstate commerce in favor of those engaged in intrastate commerce in Illinois. Further, American has presented no evidence – only innuendo and self-serving assertions – that an award of money damages will have so extensive and detrimental an impact on interstate commerce as to violate the Commerce Clause.

the local benefits. *See, e.g., Northwest Central Pipeline Corp. v. State Corp. Commission*, 489 U.S. 493, 525-26 (1989); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The Commerce Clause, therefore, does not afford American immunity for breaching its voluntarily-assumed contractual obligations or perpetrating consumer frauds.

CONCLUSION

For all the reasons set forth above, the Petition for Certiorari filed by American Airlines, Inc. should be denied.

Respectfully submitted,

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September 4, 1992

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APPENDIX

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Wolens v. American Airlines, Inc., No. 88 C 8158 (N.D. Ill. Oct. 25, 1988)..... 1a

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

WOLENS, et al., Plaintiffs, v.
AMERICAN AIRLINES, INC.,
Defendant

No. 88 C 8158

[October 24, 1988, Decided; October 25, 1988, Filed]

JOHN A. NORDBERG, UNITED STATES DISTRICT JUDGE

Plaintiffs' state class action complaint alleged that changes instituted in defendant's "American AAdvantage" frequent flyer program constituted a breach of contract and a violation of the Illinois Consumer Fraud and Deceptive Business Practices Act, Ill. Rev. Stat. Ann. ch. 121½ para. 261 *et seq.* (Smith-Hurd Supp. 1988). Defendant removed to this Court from the Circuit Court of Cook County on the grounds that the complaint raised a federal question exclusively committed to the adjudication of the federal courts pursuant to § 105(a)(1) of the Federal Aviation Act (FAA), 49 U.S.C. § 1305(a)(1), and thus the case arose under federal law. *See* 28 U.S.C. §§ 1331, 1441(b).

Plaintiffs duly moved to remand with costs and attorneys fees for improvident removal. The Court now grants their motion for remand and for costs.

In opposing remand, defendants primarily argue that the case was properly removed under the doctrine of complete preemtion and attempt to demonstrate to the Court that the FAA indeed preempts the state claims. Their arguments are not persuasive and fail under the

analysis dictated by controlling precedent. *See Metropolitan Life Insurance Co. v. Taylor,* 481 U.S. 58, 107 S. Ct. 1542 (1987).

Few requirements of federal jurisdiction are more firmly established than the well-pleaded complaint rule, which holds that "a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law." *Id.* at 1546. Since federal preemption generally constitutes a defense to a claim, it does not arise on the face of the complaint and consequently does not permit removal. *Id.* After all, the defendant can make its preemption defense just as easily to the state court as it can to the federal court.

One preemption-related qualification to the well-pleaded complaint rule, however, results when Congress has so completely preempted an area that any complaint concerning it "is necessarily federal in character." *Id.* In such cases, preemption is not properly viewed as a defense because any claim regarding the preempted subject matter is automatically deemed federal, and thus the complaint itself raises an issue of federal law.

But in deciding whether a claim is necessarily federal in character, a court is not to employ the ordinary preemption analysis that determines whether federal law preempts state law. That would be reaching the merits before determining the court had jurisdiction to act. *Cf. Kanzelberger v. Kanzelberger,* 782 F.2d 774, 776-77 (7th Cir. 1986). Instead, what a court must determine is whether Congress intended to make any action concerning the federally governed area an action arising under federal law, even if the plaintiff's well-pleaded complaint raises

only state-law claims. As the Supreme Court explained in *Metropolitan* with respect to the Employee Retirement Income Security Act (ERISA):

> [T]he touchstone of the federal district court's removal jurisdiction is not the 'obviousness' of the pre-emption defense but the intent of Congress. Indeed, as we have noted, even an 'obvious' pre-emption defense does not, in most cases, create removal jurisdiction. In this case, however, Congress has clearly manifested an intent to make causes of action within the scope of the civil enforcement provisions of [ERISA] § 502(a) removable to federal court. Since we have found [plaintiff's] cause of action to be within the scope of § 502(a), we must honor that intent whether pre-emption was obvious or not at the time this suit was filed.

107 S. Ct. at 1548. As the quoted passage indicates, the party urging *Metropolitan* preemption must demonstrate congressional intent to make any claims falling within the scope of the federal statute *removable* to federal court. Justice Brennan emphasized this point in concurrence: "In future cases involving other statutes, the prudent course for a federal court that does not find a *clear* congressional intent to create removal jurisdiction will be to remand the case to state court." *Id.* (emphasis in original).

In the instant case, defendant has pointed to no legislative history indicating a congressional intent to make any claim arguably falling within the scope of the FAA removable to federal court. Instead, defendant has pointed to the "sweeping" preemption provision of 49 U.S.C. § 1305(a)(1), which provides that "no State or political subdivision thereof and no interstate agency or

other political agency of two or more states shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier." *See also* 49 U.S.C. §§ 1302(a)(7), 1381(a). The only legislative history it has cited is a House report related to the Civil Aeronautics Board Sunset Act of 1984. The report notes:

> In addition to protecting consumers, federal regulation ensures a uniform system of regulation and pre-empts regulation by the states. If there was no federal regulation, the states might begin to regulate these areas, and the regulations would vary from state to state. This would be confusing and burdensome to airline passengers, as well as to the airlines.

H.R. Rep. No. 98-793, 98th Cong., 2d Sess. 4 (May 21, 1984), *reprinted in* 1984 U.S. Code Cong. & Ad. News 2857, 2860.

Whatever relevance the statute and legislative history have to the question whether the FAA creates a preemption defense to plaintiffs' state contract and fraud claims, they in no way indicate a congressional intent to convert these state claims into federal actions removable to federal court. Furthermore, defendant has cited no case holding that Congress intended the FAA to have that effect. In fact, as far as the Court can tell from the parties' submissions, the only areas in which Congress has been found to have intended this conversion of state law claims involve disputes preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and by

ERISA, 29 U.S.C. § 1001 *et seq. See Metropolitan; Avco Corp. v. Machinists,* 390 U.S. 557 (1968).[1]

Moreover, the legislative history relied upon by the Supreme Court in finding intent for complete preemption with regard to ERISA stands in sharp contrast to the report cited by defendant in this case. The ERISA report stated:

> [W]ith respect to suits to enforce benefit rights under the plan or to recover benefits under the plan which do not involve application of the title I provisions, they may be brought not only in U.S. district courts but also in State courts of competent jurisdiction. *All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under section 301 of the Labor-Management Relations Act of 1947.*

Metropolitan, 107 S. Ct. at 1547 (quoting H.R. Conf. Rep. No. 93-1280, at 327 (1974) (emphasis in original). As discussed in the text above, this report indicates an intent to make any claim falling within the subject matter of the relevant statutory provisions a claim arising under federal law, and thus removable. The legislative report cited by defendant, by contrast, merely states the obvious – federal regulation preempts state regulation.

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[1] Defendant contends that "[t]he Supreme Court's recent decisions . . . confirm . . . that the complete pre-emption doctrine is no longer limited to labor cases." Defendant's Response, at 13 n.8. That is true. The doctrine now extends to ERISA cases. *See also Oneida Indian Nation v. County of Oneida,* 414 U.S. 661 (1974) (state law complaint alleging right to possession of Indian lands necessarily arises under federal law). But defendant has cited no case outside these narrow areas in which the complete pre-emption doctrine has been held applicable.

Furthermore, the Court notes that the plain language of the FAA even cuts against defendant's contention that the act gives rise to a general preemption defense. *See* 49 U.S.C. § 1506 ("Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.") *See also Nader v. Allegheny Airlines,* 426 U.S. 290 (1976) (common law fraudulent misrepresentation action against airline should not be stayed pending Civil Aeronautics Board determination of whether overbooking is deceptive under FAA § 411); *Wolst v. American Airlines, Inc.*, 668 F. Supp. 1117 (N.D. Ill. 1987) (section 1305 does not preclude state courts from hearing breach of contract actions against airlines). While it is not wholly inconceivable that defendant can make out a preemption defense to defeat plaintiffs' claims on the merits in the state court,[2] it cannot plead preemption to remove to this Court.

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[2] Actually, defendant's preemption argument appears to face an uphill struggle in the state courts. Plaintiffs have cited a pending state court case in which another airline, represented by defendant's counsel here and facing a challenge to its flight promotion program, unsuccessfully moved to dismiss the part of the state law complaint based upon the Illinois consumer protection act on grounds of FAA preemption. *Sherman et al. v. Northwest Airlines, Inc.*, No. 87 CH 9010 (Cook County Circuit Court March 31, 1988). The *Sherman* case, like this case, also contains a breach of contract count. Plaintiffs report that three other such cases also are pending in Circuit Court of Cook County. *Rivkin v. Northwestern Airlines, Inc.*, No. 88 CH 2637; *Ryan v. Delta Airlines*, No. 88 CH 4846; *Zabka v. United Airlines*, 87 CH 3353. Plaintiffs inform the court that none of these cases has been removed to the Northern District of Illinois.

Defendant does, however, make two slightly different arguments in an attempt to keep this case in federal court. The first of these arguments is that plaintiffs somehow "artfully pleaded" a federally based claim in the guise of state contract and fraud claims. The sole authority that defendant cites for this argument is *Lingle v. Norge Division of Magic Chef, Inc.*, 823 F.2d 1031 (7th Cir. 1987) (en banc).

Initially, the Court admonishes defense counsel for citing authority without indicating that it has been reversed, as is true of *Lingle*. *See Lingle v. Norge Division of Magic Chef, Inc.*, ___ U.S. ___, 108 S. Ct. 1877 (1988).[3] While a federal claim cannot masquerade as a state law claim through the expedient of artful pleading, the Court has carefully examined the complaint, and concludes that it only pleads what it purports to plead – state law contract and fraud claims. *See Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, 816 F.2d 1191, 1194-95 (7th Cir. 1987).

Defendant's final argument is that plaintiffs' complaint may be removed because it arises under federal common law. This argument is largely a rehash of defendant's preemption argument.[4] In any event, defendant

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[3] If counsel's point was that the reversed case is still good law for the proposition for which it is cited, counsel should be advised that the proper citation form is "reversed on other grounds."

[4] *See* Defendant's Response, at 15 ("Most of the numerous reasons which compel the application of federal common law in this case have been discussed in other contexts above and need not be repeated here."). Defendant then proceeds to argue once more that the FAA should preempt plaintiffs' state law action.

cites no case in which state contract and fraud claims against airlines have been held to be governed by federal common law. Given the extremely limited play the federal common law enjoys, *see Barany v. Buller*, 670 F.2d 726 (7th Cir. 1982), the Court finds that this apparent state law case is not actually governed by the federal common law.

Accordingly, for the foregoing reasons, this case is remanded to the Circuit Court of Cook County. Pursuant to 28 U.S.C. § 1447(c), the Court awards plaintiffs the costs of this action.

ENTER:

/s/ John A. Nordberg
JOHN A. NORDBERG
United States District Judge

Dated: October 24, 1988